thought to support PW3's questionable evidence that the defendant intended only to transfer his one-quarter interest in the partnership property in the form of the Kajang shophouse. I found that the defendant was quite inconsistent in his defence. In the original defence, he had averred that the first plaintiff agreed to pay the sum of $170,000 as the agreed purchase price for his share alone in the partnership and had categorically denied that this sum also included DW3's share. However at the end of the plaintiff's case he amended his defence to aver something totally opposite, ie that the sum was the consideration for both his share and DW3's share in the partnership business for the withdrawal and take-over exercise. In view of all the above reasons, I find as a fact that the amount agreed to be paid to the defendant (and DW3) for their joint withdrawal from the partnership business was $140,000.

I therefore declare that the first plaintiff was entitled to the whole of the Kajang shophouse and that the surplus of the proceeds of its sale amounting to $121,896.40 has vested in the Official Assignee for the benefit of the general body of creditors in the bankruptcy of the first plaintiff.

I also direct that the surplus sum together with all accrued interest now held in the fixed deposit account with Bank Rakyat be released to the second plaintiff.

Order accordingly.

Solicitors: *Dulip Singh & Co.*

Reported by *Wong Kim Fatt*

Polygram Records Sdn Bhd v Hillary Ang & Ors

HIGH COURT (KUALA LUMPUR) – CODE NO C2-22-52-88
SITI NORMA YAAKOB J
8 JUNE 1988

Contract – Recording contract with exclusive performance clause – Interim injunction applied for to compel performance of negative agreement not to record with others – Whether damages a more appropriate remedy – Specific Relief Act 1950, s 55

The plaintiffs, a music and sound recording company, applied for an interim injunction to restrain the first to fifth defendants from holding themselves out as being free to enter into any recording contract with any other recording company except the plaintiffs and to restrain the sixth defendant, a rival company, their servants and agents from entering into any distributorship agreement with the first to fifth defendants for the purpose of distributing their musical works recorded by the first to fifth defendants' own company or by any other company. The plaintiffs had entered into an agreement with the first to fifth defendants, whereby the latter undertook, for a period of two years, to perform musical works for the plaintiffs exclusively which the plaintiffs would distribute and sell. The plaintiffs alleged that the first to fifth defendants had breached their undertakings under the agreement by recording their musical works with other individuals, firms and companies, particularly the first to fifth defendants' company, and with the sixth defendant, thereby depriving the plaintiffs of the profits which they would otherwise have earned. The first to fifth defendants, whilst not disputing that they had breached their undertakings under the contract, contended at the hearing that (a) the contractual relationship between them and the plaintiffs no longer existed as there was no effective exercise by the plaintiffs of their option to renew the agreement after its expiry; (b) even if there was a contract, the court should be reluctant to grant an injunction as the contract was a contract of or for personal service; and (c) damages would be a more appropriate remedy.

Held, allowing the application: (1) Under the agreement, the plaintiffs were given an irrevocable option to renew the agreement for a further two years provided that the plaintiffs observed and performed all their obligations thereunder. There was nothing in the agreement to require the plaintiffs to communicate in writing to the first to fifth defendants their intention to renew the agreement. In the instant case, the plaintiffs had therefore properly and effectively exercised their option with the result that the agreement was still in existence and the first to fifth defendants were still bound by their undertakings not to perform for others except the plaintiffs.

(2) Although the contract was one for personal service, what the plaintiffs were trying to enforce was their right to have the undertakings given by the first to fifth defendants observed. Accordingly, under s 55 of the Specific Relief Act 1950, the court was not prevented from exercising its discretion to grant the interim injunction to compel the performance of a negative agreement asked for by the plaintiffs although the court could not compel specific performance of the affirmative agreement to perform.

(3) Bearing in mind the brand of music involved, the uncertainty of acceptance of their recordings and their selling power, the quantification of damages was not possible. Having regard to the peculiar facts of the instant case, an interim injunction was ordered to be issued with the usual undertaking as to damages by the plaintiffs in the event that the first to fifth defendants should succeed in having it set aside later. The interim injunction was to remain until further order.

Legislation referred to
Specific Relief Act 1950 s 55

SF Wong (*P Ramakrishnan* with him) for the plaintiffs.
Muhammad Shafee Abdullah (*Christina Kow (Miss)* with him) for the defendants.

Cur Adv Vult

Siti Norma Yaakob J: The first to fifth defendants in this suit are popular recording artistes belonging to a group called 'The Search'. On 12 June 1985, the second, third and fifth defendants, together with two others (who made up the original members of 'The Search'), entered into an agreement with the plaintiffs, a music and sound recording company, whereby for the next two years expiring on 11 June 1987, the group undertook to perform

musical works for the plaintiffs exclusively which the plaintiffs would distribute and sell.

Towards the end of 1985, the first and fifth defendants replaced two original members of the group and this substitution appears to have had the consent of all parties concerned. The sixth defendant is a rival company of the plaintiffs, engaged in the same business of recording and distributing musical works.

In this suit, the plaintifs allege that the first to fifth defendants had breached their undertakings under the agreement by recording their musical works with individuals, firms and companies, particularly their own company called Go Search Sdn Bhd and with the sixth defendant, thereby depriving the plaintiffs of the profits they would have earned had there been no breach and for this very reason, they had applied for an interim injunction principally:

(1) to restrain the first to fifth defendants from holding themselves out as being free to enter into any recording contract with any other recording company, except the plaintiffs;

(2) to restrain the sixth defendant, their servants and agents from entering into any distributorship agreement with the first to fifth defendants for the purpose of distributing their musical works recorded by Go Search Sdn Bhd or by any other company.

Whilst not disputing that they had breached their undertakings under the contract, nonetheless the first to fifth defendants had raised the following objections at the hearing:

(1) the contractual relationship between them and the plaintiffs no longer exists;

(2) even if there is one, the court should be reluctant to grant an injunction as the contract is a contract of or for personal service;

(3) damages would be a more appropriate remedy.

It is the first to fifth defendants' contention that the contract had lapsed under cl 6 of the agreement by effluxion of time, as there was no effective option exercised by the plaintiffs under cl 6(ii) to treat the agreement as still subsisting until 11 June 1989. They further maintain that the plaintiffs should have expressed their intention to exercise the option by communicating such intention to them in writing and since this was not done, there are no contractual obligations binding them to each other.

Clause 6(ii) expressing the term to extend the agreement for a further 24 months after its expiry on 11 June 1987 speaks of an irrevocable option to renew and the only condition attached to the exercise of such an option is that the plaintiffs must have observed and performed all their obligations under the agreement before they can exercise such an irrevocable option. The clause does not mention that in the exercise of such an option, the plaintiffs must communicate their intention to do so in writing to the first to fifth defendants and the fact that the parties had agreed that such an option was an irrevocable one makes it more understandable that no express intention was intended or envisaged.

The first to fifth defendants are fully aware that they are still bound by their contract to the plaintiffs till as late as 10 February 1988; they acknowledge that the contract still subsists as can be seen from a newspaper report appearing at p 56 of the exhibits attached to the plaintiffs' affidavit in support of their application for the interim injunction. Added to this is the undisputed fact that even after 11 June 1987, the group continued collecting their royalties from the plaintiffs. Since there is no evidence that the plaintiffs failed to observe their obligations under the contract, I concluded that there had been a proper and effective exercise of the option by the plaintiffs, and the first to fifth defendants are still bound by their undertakings not to perform for others except the plaintiffs.

The first to fifth defendants also submitted that the contract is void as being restrictive as cl 6(v) prevents them from performing worldwide. Reading cl 6(v) in its entirety, it is clear that that clause becomes operative only when the contract is terminated. In this case, it is quite premature to rely on cl 6(v) as I have already held that the contract is still subsisting.

Admittedly the contract is one for personal service but what the plaintiffs are trying to enforce is their right to have the undertakings given by the first to fifth defendants enforced. It is not that the plaintiffs are preventing them from earning a livelihood altogether but that they should not do so with others for their livelihood is already guaranteed by their undertakings in the contract. To that extent, I consider that the court is not prevented from exercising its discretion to grant the interim injunction to compel the performance of a negative agreement asked for by the plaintiffs although it cannot compel specific performance of the affirmative agreement to perform (see s 55 of the Specific Relief Act 1950).

Lastly, there is the issue as to whether damages would be a more adequate remedy under the circumstances of this case. It must not be forgotten that the first to fifth defendants are members of a singing group of pop music and that sales of their recordings depend largely on their popularity. Right now, they are at the height of their popularity and sales are expected to be brisk and rising. Under cl 6(iii) of the agreement, it is specified that they are expected to make ten sound recordings with the plaintiffs during the period 1985-87 and ten more during the option period with a possibility of extra per-

formances being arranged and performed during the relevant periods. Thus bearing in mind the brand of music involved, the uncertainty of acceptance of their recordings and their selling power, it is clearly understandable that quantification of damages is not possible and on balance I had concluded that on the peculiar facts of this case, an interim injunction should issue in the manner asked for by the plaintiffs with the usual undertaking as to damages by the plaintiffs in the event that the defendants should succeed in having it set aside later. Here I need to make it clear that the interim injunction should be until further order as that was not specifically stated by me when making the order.

Order accordingly.

Solicitors: *Shearn Delamore & Co*; *Shafee & Co.*

Reported by *Teo Keang Sood*

Mohammad bin Abdullah & Ors v Fu Lee Development Sdn Bhd

HIGH COURT (JOHORE BAHRU) – CIVIL SUIT NO F37 OF 1983
LC VOHRAH J
21 MAY 1988

Civil Procedure – Garnishment of moneys held by garnishee as stakeholder – Intervention by intervener – Whether debt due from judgment debtor – Rules of High Court 1980, O 49 r 1(1)

This is an application by the intervener against the decision of the senior assistant registrar ordering that certain moneys held by the garnishee as stakeholder remain garnished until further inquiry to satisfy a judgment recovered against the judgment debtor by the judgment creditors.

The sums of moneys available by way of end-financing provided by the intervener for the housing project developed by the judgment debtor were released progressively to the judgment debtor by the intervener on the basis of certificates of completion issued by the architect for the housing project. All payments paid by way of end-financing were channelled to the judgment debtor through the garnishee, a firm of solicitors. The final instalment amounting to 5% of the purchase price was to be retained by the garnishee as stakeholders until the issuance of the certificate of fitness. The judgment creditors' units were completed in 1982 but the certificates of fitness had not been issued by the authorities in respect of these units.

The sole issue for determination in this appeal is whether there is a debt due or accruing due to the judgment debtor from the garnishee within the meaning and scope of O 49 r 1(1) of the Rules of the High Court 1980.

Held, allowing the appeal with costs: The moneys in the hands of the intervener cannot constitute a debt due or accruing due to the judgment debtor until the fulfilment of the contingency, that is, until the certificate of fitness is produced.

Cases referred to

1 *Dunlop & Ranken Ltd* v *Hendall Steel Structures Ltd (Pitchers Ltd, Garnishees)* [1957] 3 All ER 344 (folld)

2 *Hongkong and Shanghai Banking Corporation* v *Goh Su Liat (Telecommunication Authority of Singapore, Garnishee)* [1986] 2 MLJ 86 (folld)

Legislation referred to

Rules of the High Court 1980 O 49 r (1)

RD Rajasingam for the judgment creditors.
NV Kumar for the judgment debtor.
S Fernandez (*Pawan Chik bin Marican* with him) for the intervener.
YL Ng for the garnishee.

Cur Adv Vult

LC Vohrah J: This is an appeal by the intervener against the decision of the learned senior assistant registrar ordering that certain moneys held by the garnishee as stakeholder remain garnished until further inquiry to satisfy a judgment recovered against the judgment debtor by the judgment creditors.

The facts of the case in so far as they are relevant to this appeal are as follows. The intervener as the financier for a housing project developed by the judgment debtor provided two types of loan – known in commercial parlance as 'bridging loan' and 'end-financing', the former to the judgment debtor and the latter to the individual purchasers of the units in the housing project. The sums available by way of end-financing were released progressively to the judgment debtor by the intervener on the basis of certificates of completion issued by the architect for the housing project. All payments made by way of end-financing were channelled to the judgment debtor through the garnishee. It is stipulated in the sale and purchase agreement between the judgment debtor and the purchaser that the final instalment amounting to 5% of the purchase price is to be retained by the garnishee as stakeholder until the issuance of the certificate of fitness. The judgment creditors' units were completed in 1982 but certificates of fitness have still not been issued by the authorities in respect of these units. By an exchange of letters in 1983 (see exhibits WAZ-9 and WAZ-10, encl 40), the judgment debtor and the intervener, with notice to the garnishee, confirmed what purported to be an assignment whereby all the moneys comprising the final 5% instalment payment of the purchase price which had been forwarded to the garnishee were to be held by the garnishee as stakeholder on its undertaking as a firm of solicitors to remit these sums back to the intervener upon issuance of the relevant certificates of fitness towards reduction of the judgment debtor's account with the intervener. This assignment was effected two years before the judgment creditors obtained their judgment against the judgment debtor.